United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7036
76-7115

To be argued by
RENEE MODRY

B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ISAAC LORA, etc. et al, on behalf of themselves and all others simularly situated,

Plaintiffs-Appellants

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

APPELLEES' BRIEF

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Preliminary Statement

In this civil rights action for declaratory and injunctive relief brought pursuant to 42 U.S.C. §§ 1981, 1983 and 2000d, plaintiffs appeal from two orders of the United States District Court for the Eastern District of New York (BRUCHHAUSEN, J.) entered on January 6, 1976, and March 8, 1976 respectively, denying their motions for class action certification and for a preliminary injunction. Plaintiffs' appeals from each of these orders has been consolidated by order of this Court dated March 18, 1976.

Plaintiffs, seven Black or Hispanic children assigned to schools for socially maladjusted and emotionally disturbed children ("SMED Schools") in the public school system of the City

of New York, allege that their constitutional rights are being violated because the schools are "overwhelmingly Black and Hispanic", do not provide them with "adequate and appropriate education", and are sexually segregated; and because they are searched daily, are subject to corporal punishment or "excessive and unnecessary corporal punishment", were assigned to the SMED Schools without "adequate notice and an opportunity to be heard at a due process evidentiary hearing" and "without a right to periodic review of their status." (A4,5)* Plaintiffs seek to have these "acts and omissions" declared unconstitutional and to enjoin their continued placement in SMED Schools unless these "acts and omissions are rectified" (A5).

Plaintiffs have asked for class action certification to represent all Black and Hispanic children who are "in placement" at SMED Schools and for certification of defendants as a class consisting of assistant high school superintendents, community school district superintendents and public school principals in the City of New York" who are authorized to approve the transfer of plaintiffs to SMED Schools"(A110, 112).

Plaintiffs have also moved for preliminary injunctive relief (1) mandating termination of their SMED School placement unless within 10 days (of an order granting their motion) they

*Numbers in parenthesis preceded by the letter A refer to the pages of the Appendix. Numbers in parenthesis preceded by letter SA refer to the pages of the Supplementary Appendix.

are given written notice of the reasons for their placement, of their right to counsel, and their right to prior review of all records in defendant's possession, upon which their placement is based; a "due process evidentiary hearing" including the right to counsel, to confront witnesses and to present evidence on their own behalf and to have minutes taken of the hearing and written findings showing the basis for their placement in a SMED School and (2) prohibiting defendants from searching them without "probable cause" and from requiring them to place their belongings with school officials in order to attend classes (SA 1-3).

Defendants, City school officials, allege that the SMED Schools provide "a comprehensive educational and therapeutic environment", a student/staff ratio of approximately 6.7 to 1 to permit individualized programs of reading and math as well as regular academic subjects, physical education, tutorial and special interest subjects (A 66, 70, 75, 79, 84, 85, 87, 89,91), and that sexual segregation is based upon sound educational reasoning (A65). Defendant also allege that there is no policy of regularly searching students or of direct or tacit approval for use of corporal punishment (A65, 66) and that the children assigned to SMED Schools are not assigned without parental consent after consultation with school officials and clinical personnel, which assignment is reviewed on a regular basis. Children who are assigned to the SMED Schools are generally children with a "history of repeated disruptive and aggressive behavior, extensive

in scope and serious in nature, which either endangers the safety of pupils or others, or seriously interferes with learnings in the classroom" (A96).*

Questions Presented

1. Did the District Court abuse its discretion by denying plaintiffs' motion for a preliminary injunction?

2. Is the denial of class action certification by the District Court an appealable order?

3. If the order is appealable, did the District Court abuse its discretion by denying class action certification?

*Effective May 1, 1976, new guidelines have been adopted for compliance with 20 U.S.C. §1411 et seq. The guidelines provide for a full due process evidentiary hearing before transfer to a SMED School. The guidelines are set forth in the Appendix to this Brief.

FACTS

The respondent Board of Education of the City of New York (hereinafter referred to as the "City Board") through its centralized Division of Special Education and Pupil Personnel Services (DSEPPS) operates a program for the education of all handicapped children, including emotionally disturbed children. One component of that program is the Special Day Schools for the education of Socially Maladjusted and Emotionally Disturbed Children (known as "SMED" Schools).* The SMED schools are under the specific control of the Bureau for the Education of Socially Maladjusted and Emotionally Disturbed Children (BSMEDC) which is a bureau within DSEPPS. These schools are the subject of this litigation.

At present there are seventeen SMED schools located in Brooklyn, Queens, Manhattan and the Bronx, servicing approximately 2950 students (A 60,62, 65). The SMED school population averages approximately 175 children per school with a student-staff ratio of approximately 6.7 to 1 and with an individualized program of intensive remedial to advanced reading and math, as well as, the regular academic subjects, e.g., social studies, language arts, science, art, music, physical education, and tutorial and special interest

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* Inaccurately referred to as "600" schools by plaintiffs throughout their papers.

subjects, such as, ceramics and art skills, various workshops, driver education. The small school and class size and the individualized programs at each SMED school permits a student to become known to all staff on a personal basis, and frequent and positive interaction between child and teacher are the norm. (A66).

Prior to April, 1975, screening, referral and placement of a child in a SMED school was governed by Special Circular #47, dated November 22, 1972, issued by the Chancellor of the City Board (A96-97). In April, 1975 the procedures for screening, referral and placement of a child in a SMED school were substantially revised and a new proposed circular was drafted to replace Spcial Circular #47.

In December, 1975 Special Circular #35 officially codified the new screening procedures which were in effect since April, 1975 (A98-102).

The essential distinction between Circular 47 and Circular 35,procedures for screening, referral and placement in a SMED school was the requirement that each child referred for placement must be clinically assessed and diagnosed by a team of professionals to determine whether the child is handicapped and whether the SMED school placement is appropriate. Parental consent was required at every stage of the referral to placement process. Under the prior procedures

a clinical assessment was not mandated, but it was made in many cases. Also, parental consent was not mandated but as a practical matter was required in virtually every case. Under Circular 35, written consent was mandated at every step of the process.

Further and while the protections afforded to plaintiff and child under Special Circular #35 provided for parental consent, re-evaluation and review of each placement, the city-board through DESPPS provided a several step procedure whereby a parent or child could contest a finding of handicapping condition, a referral for placement, or a placement in a SMED school program or any other speical education program.

This appeal and review procedure covered any contest of the identification, evaluation and/or placement process of a child to a special education program and permits review of any action, recommendation or conclusion of the clinical staff of the city board with respect to any child determined to be handicapped.

In 1974 the Bureau for the Education of Socially Maladjusted and Emotionally Disturbed Children (BSMEDC) instituted another program for the education of emotionally disturbed children This program is entitled, Special Classes for Emotionally Handicapped Children (hereinafter referred to as "CEH classes"). The CEH program, still in its infancy, provides special education classes within the

the regular school building. The children attending these CEH classes like the children in the SMED schools are provided with intensive and individualized educational programming and regular clinical support.

The interaction of the SMED day school and the CEH programs within BSMEDC is designed to provide a "continuum of services", whereby a child might move between the regular school, the CEH and the SMED day school programs on a "need and improvement" basis, thereby utilizing the best available approach for that individual child at any point in time.

Plaintiffs allege that they have been placed into SMED schools whose population is overwhelmingly Black and Hispanic without provision for adequate and appropriate education. Defendants contend initially that the SMED schools have full, adequate, intensive and individualized educational programs for the students in attendance and, further, that the SMED schools are just one segment of the entire BSMEDC program which bureau wide has an approcimate ethnic breakdown of 51.5% Black, 31.1% Hispanic and 17.4% other. While the city-wide ethnic breakdown for all schools in the city school system is approximately 36.6% Black, 27.9% Hispanic and 35.5% other, defendants contend that if an imbalance exists in the BSMEDC programs, said imbalance exists due to the needs of students and has no basis in any actions, invidious or otherwise of the defendants.

Plaintiffs and their parents assert that they and their children are not permitted an opportunity to contest a SMED school placement. Defendants assert that prior to April, 1975, referrals to a SMED school were made on the basis of careful determination as to the needs of the individual child. In many cases a diagnostic work-up recommended a removal from the mainstream into a more structured environment. Parental consent to the placement was always obtained. After April, 1975, every child referred to a SMED school has been specifically diagnosed by a clinical team and referred to a SMED school which is deemed clinically appropriate. Special Circular #35 which codified the new referral for placement procedures for the SMED school program provided for clinical certification of appropriateness and need prior to any referral or placement in a SMED school; it provided for written parental consent and consultation at every stage of the referral to placement process as well as regular re-evaluation for appropriateness of all children in attendance at a SMED school (A98 -100). Each SMED school provides a rich educational and guidance program, and return to the mainstream when appropriate is the persistent goal of the program.

Defendants assert that the SMED schools are an appropriate program for providing education and socialization to emotionally handicapped children and, in fact, said schools have been successful in taking children who were

stagnating or who could not cope with the generally large scale regular school system and motivating them to further their education and social development. The SMED school as part of the continuum of services provided by the Bureau for Socially Maladjusted and Emotionally Disturbed Children (BSMEDC) is one phase of a program which includes classes for the emotionally handicapped (CEH), resources rooms in regular schools, transitional classes, the Teacher/Mom Program and other programs.

Defendants assert that the SMED schools operate as a viable and useful educational tool for certain emotionally handicapped children within the ambit of constitutional guidelines and that plaintiffs' assertions of unconstitutional acts and omissions are, at best, incorrect.

New City Board due process procedures are to be implemented May 1, 1976 * under 20 USC §1411 et seq., which plan includes additional and full due process guidelines. These procedures or Regulations of the State Commissioner of Education which are reproduced as an appendix to our brief, govern the transfer of handicapped children, including emotionally disturbed children, in public schools to special educational facilities, such as SMED schools, and provide, inter alia, written notice of the proposed classification

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*It should be noted that pursuant to 20 USC §1411 et seq. the State of New York which receives federal Title VI funds for the education of handicapped children was required to submit a plan to include certain due process procedures as spelled out in 20 U.S.C. §1411(a)(13).

of the child and the reasons for the classification; specify the tests or reports upon which the proposed classification is based; state that the school records are available for review; describe in detail the right to obtain a hearing if there are objections to the proposed classification; describe the procedures for appeal; advise the parent of the opportunity to obtain an independent educational evaluation of the child and, except where the presence of the child poses a continuing danger to persons or property or threatens disruption of the academic process, permit the child to remain in his present educational placement until a decision is made in connection with an appeal. (Reg. 200.10) The Regulations also provide for a hearing at which the parties may be represented by counsel or others with an opportunity to "confront and question witnesses and for administrative appeals.

POINT I

PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY ARE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF.

(1)

The issuance of a preliminary injunction lies within the discretion of the district court and will not be disturbed unless there is an abuse of discretion. Doran v. Salem Inn, Inc., 422 U.S. 922, 931-932 (1975). However, where, as in the instant case, there has been no hearing on the motion for a preliminary injunction, this Court may review the papers de novo. San Filippo v. United Brotherhood of Carpenters and Joiners of America, 525 F. 2d 508, 511 (2d Cir., 1975).

It is well settled that the standards to be applied by the District Court in granting the injunction are "stringent". Doran v. Salem Inn, Inc., supra, at 931.

In order to obtain such extraordinary relief , plaintiff must show "a combination of probable success on the merits and the possibility of irreparable injury or, in the alternative, that he has raised serious questions going to the merits and that the balance of hardships tips 'decidedly' in his favor." Brown & Williamson Tobacco Corp. v. Engman, 527 F. 2d 1115, 1121 (2d Cir., 1975); Pride (L) v. Community School Board of Brooklyn, N.Y. School District #18, 482 F. 2d 257, 267 (2d Cir., 1973); Checkers Motors Corporation v. Chrysler Corporation, 405 F. 2d 319,

323, (2d Cir. 1969).

When the public interest is involved, as it is here in providing maximum educational opportunity for all children, with minimum disruption, courts "frequently go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginian Ry. Co. v. System Federation, 300 U.S. 515, 552 (1937); Yakus v. United States, 321 U.S. 414, 440-441 (1943); Abbott Laboratories v. Gardiner, 387 U.S. 136, 156 (1967); Brown & Williamson Tobacco Corp. v. Engman, supra; Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., 476 F. 2d 687, 699 (2d Cir. 1973); Stamicarbon N.Y. v. American Cyanimid Company, 506 F. 2d 532 (2d Cir. 1974). ("A determination of the propriety of interim injunctive relief cannot always be made simply by reference to the interests of the parties before the Court.").

The limited availability of injunctive relief was emphasized by the Supreme Court in Rizzo v. Goode, ____ U.S. ____; 46 L. Ed. 2d 561, 574, 575 (1976);

> "When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with 'the well established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs,' Cafeteria Workers v. McElroy, 367 U.S. 886, 896..."

Thus, the Court reiterated its prior holdings that "the principles of equity ... militate heavily against the grant of an injunction except in the most extraordinary circumstances" and applied the principle to those in charge of an executive branch of an agency of local government.

(2)

Measured by these well established standards, plaintiffs' motion for preliminary mandatory and prohibitory relief must be denied.

The Courts are and have been reluctant to interfere with the role of the education authorities to administer and control the educational system within the school district. In 1969, the Supreme Court of the United States set the tone for judicial restraint in overseeing school board actions:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint... By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 US 97, 104 (1969).

"...[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials consistent with constitutional safeguards to prescribe and control conduct in these schools." Tinker v. Des Moines School District, 393 U.S. 503, 507 (1969). Values are not to be "implemented by judicial intrusion into otherwise legitimate state activities unless such legislation deprives, infringes or interferes with the free exercise of some such fundamental personal right or liberty." San Antonio Indep. School District v. Rodriguez, 411 U.S. 1, 38 (1973). In Griffin v. Illinois, 351 U.S. 12 (1956), the Supreme Court held that for the Courts to intervene there must be an "absolute deprivation of a meaningful opportunity to enjoy that benefit" to which one is entitled by State law. There is no deprivation of education in this case, and, indeed, it is defendants' position that SMED schools are educationally superior for these plaintiffs and for many other emotionally handicapped children.

In Brookins v. Bonnell, 362 F. Supp. 379 (E.D. Pa, 1973), the Court held hearings not to be required where students were affected by academic as opposed to misconduct determinations. Since there is in the case at bar no deprivation of education to plaintiffs, but merely a transfer to a more appropriate educational program, there is neither deprivation of "property" nor "liberty" and, in the

absence of such deprivation, the procedural protection of the due process clause may not be invoked. Cf. Paul v. Davis, 44 LW 4337, 4340 (March 23, 1976).

Unlike the students in Goss v. Lopez, 419 U.S. 565 (1975), who were suspended from school, plaintiffs have not been deprived of their right to an education. Indeed, the Supreme Court pointed out that even when there was such a depri ation, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

Even if, arguably, the transfer to a SMED school remotely represented the loss of a "property" right, the new procedures promulgated by the Commission of Education and effective May 1, 1976 (a copy is reproduced at the Appendix to this brief) provide a panoply of due process safeguards, far beyond constitutional requirements.

While plaintiffs were transferred to SMED schools with parental consent and after consultation with clinical authorities under Circular 47, which was subsequently superceded by Circular 35, and the Court below necessarily based its decision denying injunctive relief on these now soon to be superceded regulations, this Court must review the order below in light of the law as it now stands, not the law in effect at the time the order below was entered. Fusari v. Steinberg, 419 U.S. 379, 387 (1975); Diffendirfer v. Central Baptist

Church, 404 U.S. 412, 414 (1972). Hall v. Nals, 396 U.S. 45, 48 (1969). Measured by the standards in the new regulations, plaintiffs have failed to show either likelihood of success on the merits or serious questions going to the merits.*

(3)

We note that plaintiffs moved for a preliminary injunction more than six months after the commencement of the action. Such a delay raises serious questions concerning the extent of irreparable injury or the urgency of the relief sought. Varsity House, Inc. v. Varsity House, Inc., 377 F. Supp. 1386, 1388 (E.D.N.Y. 1974).

Moreover, plaintiffs' complaints of injury are speculative and, as such may not be the basis for a finding of irreparable injury. Gulf Oil Corp v. Federal Energy Administration 391 F. Supp. 856 (W.D. Pa, 1975), appeal dism. 521 F. 2d 810 (Temp. Emergency Court of Appeals, 1975); Treasure Valley

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* Plaintiffs will undoutedly argue that the regulations are not retroactive and will not be applied to students already in SMED Schools. We have been informed that the new regulations will be applicable to present SMED students who desire to avail themselves of these procedures.

Potato Bargaining Ass'n v. Ore-Ida Loads, Inc., 497 F. 2d 203 (9th Cir., 1974), cert. den. 419 U.S. 999 (1974).

(4)

The defendant City Board has stated unequivocally that there is no policy or general practice whereby students at SMED schools are searched by school personnel. It should be noted that students (especially on the high school level) are encouraged by the teachers to turn in any weapons which they might have in their possession. Further, if a weapon is observed in the possession of a student, that student will be asked to give it up or the teacher will take said weapon from the child and deposit it with the principal of the school . If the school authorities are advised by students or others that a child has a weapon, that child will be asked to turn in any weapon, and the parent may be called, if further action is necessary.

Plaintiffs allege an indiscriminate practice in the SMED schools of searching all students without their consent and note that one principal at a deposition indicated that at P 91 , a SMED school, children were asked to deposit all weapons at the entrance door of the school. From this statement, plaintiffs postulate that indiscriminate search and seizure takes place throughout the SMED schools.

The existence of one such incident, or even a number of such incidents, does not give rise to any entitlement of preliminary injunctive relief against the entire school system on the basis of pure speculation that this policy may exist elsewhere and in the future. Cf. Rizzo v. Goode, supra.

Placing aside the inherent infirmities in plaintiffs' allegations of a pattern of searches and seizures at the SMED schools and the strong denial by the defendants, it should be noted that the obligation to maintain discipline and provide security in the schools derives from statute and is delegated to the local boards of education. New York State Education Law §§1604(9), 1709(2), 2590-e(8), 3214(3)(b). "The power of the state to control the conduct of children reaches beyond the scope of its authority over adults even where invasion of protected freedom is involved." Ginsberg v. New York, 390 U.S. 629 (1967).

Reiterating this same point is the recent case Peo. v. Scott D., 34 N.Y. 2d 483, 487, 488, 490 (1974), on which plaintiffs so heavily rely for the point that teachers or other school officials are proscribed from performing "random causeless searches" of students based upon unfounded "equivocal suspicion."

The Court in Scott D. did not hold school officials to the same standards in conducting their searches as those which apply to police officers:

> "The ultimate issue is one often faced in the law: the balancing of basic personal rights against urgent social necessities, a balancing always fraught with difficulty, strain and niceness of distinctions. Given the special responsibility of school teachers in the control of the school precincts and the grave threat, even lethal threat, of drug abuse among school children, the basis for finding sufficient cause for a school search will be less than that required outside the school precincts." 34 N.Y. 2d p. 488.

Factors to be considered are age, history and record in the school, the prevalence and seriousness of the problem in the school where the search occurred, and, of course, the exigency to make the search without delay. 34 N.Y. 2d at p. 489. See also, People v. Singletary, 37 N.Y. 2d 310 (1975).

These New York decisions all recognize, quite correctly, we believe, the distinct relationships between school authorities and students and the necessity of some curtailment in the schools of Fourth Amendment rights.

Plaintiffs have accordingly, failed to establish any likelihood of success on the merits on their complaint of illegal searches and seizures.

POINT II

THE APPEAL FROM THE ORDER DENYING CLASS ACTION CERTIFICATION SHOULD BE DISMISSED ON THE GROUND THAT THIS IS NOT A FINAL ORDER. IF THE APPEAL FROM THIS ORDER IS NOT TO BE DISMISSED, IT SHOULD BE AFFIRMED.

Notwithstanding Chief Judge Kaufman's recently expressed hope that the question of the appealability of class action determinations would "soon be resolved with some measure of certainty," Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1095, (2d Cir. 1974), for better or worse, that hope has not been realized. See, e.g., In re Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975). However, whatever is the proper test for appealability of such orders, "death knell," "fundamentality," or whatever, we respectfully submit that this order should be held not final and therefore not appealable.

There is nothing about this law suit, certainly not at its present stage, that argues for its being allowed to proceed as a class action; and the denial of class action status has not spelled its "death knell." Plaintiffs are represented not by private counsel, who would be expected to be interested only in the interests of particular plaintiffs who might be mooted out of the action, but rather by a public interest organization whose interest obviously goes beyond the named plaintiffs and can be expected to seek out further individual plaintiffs in the event

mootness is threatened. Cf. Gerstein v. Pugh, 420 U.S. 103, 110-111 note 11. *Moreover, plaintiffs are free at any time to reapply to the District Court for consideration of the issue of class representation.

In addition to these factors militating against a finding of finality of this determination, these very same factors, together with other considerations here present, argue strongly against any finding by this Court that Judge Bruchhausen abused his discretion in denying class action certification. Such certification might as a practical matter never be necessary even if plaintiffs are correct. Cf. Finnerty v. Cowen , 508 F. 2d 979, 986 note 20 (2d Cir. 1974). And, certainly, on this record and at this early stage in this litigation, this determination should not be held to constitute an abuse of discretion.

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*It is not even clear that mootness as to a particular plaintiff would bar continuation of the action without a class certification Compare Frost v. Weinberger, 515 F. 2d 57, 62-65, (2d Cir. 1975),with Franks v. Bowman Transp. Ct., _____ U.S. _____, 96 S. Ct. 1251, 1258-1260 (1976), which latter decision appears to indicate that class certification is necessary to avoid dismissal for mootness.

CONCLUSION

The order of the District Court denying plaintiffs' motion for a preliminary injunction should be affirmed. The appeal from the order denying class action certification should be dismissed or in the alternative, the order should be affirmed.

April 27, 1976.

Respectfully submitted,

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APPENDIX

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION
Pursuant to Section 207 and 4002 of the Education Law

Part 200 of the Regulations of the Commissioner of Education is amended by the repeal of Section 200.1 and 200.2 thereof, and the addition of new Sections 200.1, 200.2, 200.10, 200.11, and 200.12, effective May 1, 1976, to read as follows:

Section 200.1 - Definitions. (a) Chief school officer means the superintendent of schools in a district which employs its own superintendent and the supervising principal in a district which does not employ its own superintendent of schools; in the New York City district, the Chancellor shall for purposes of this Part be the chief school officer.

(b) Days means work days.

(c) A handicapped child is one who, because of mental, and/or physical, and/or emotional reasons, is not benefiting or cannot be expected to benefit from regular classroom instruction, but who can benefit from special services and programs which include, but are not limited to, transportation; home teaching; special classes; special teachers; pupil personnel services; resource rooms; state-operated or state-supported special schools or other special facilities; and/or those services, facilities, or programs which can be obtained through the payment of tuition to boards of cooperative educational services, public school districts, registered non-public schools, or other State Education Department approved agencies.

(1) A mental reason means a condition which impairs or limits the child's intellectual functioning.

(2) A physical reason means a condition which incapacitates the child and includes orthopedic, visual, auditory, neurological, cardiac and other medical or organic conditions which result in inability to benefit from the regular educational programs for non-handicapped children without some form of special services or program.

(3) An emotional reason means a condition of psycho-social origin leading to behavior which interferes with the child's ability to adjust to and benefit from existing regular class programs.

(d) Home teaching means instruction provided on an individual basis for a handicapped child confined to the home, hospital, or other institution because of the handicapping condition which precludes placement in a program in public schools.

(e) Impartial hearing officer means the chief school officer of a school district or his designee assigned to preside at a hearing. An impartial hearing officer shall be:

(1) unbiased, having no prejudice for or against any party involved in the hearing;

(2) disinterested, having no personal interest in the outcome; and

(3) uninvolved, who although he may be an officer, employee, or agent of the school district, shall not have participated in any manner in the formulation of the recommendation sought to be reviewed.

(f) An individual psychological examination means a comprehensive process by which an approved school psychologist uses a variety of psychological tools and techniques to study and describe a pupil's developmental, learning, behavioral, and other personality characteristics for the purpose of education planning.

(g) Notice means (1) written statements in English and/or in the primary language of the parent's home, and (2) oral communication in the primary language of the home.

(h) Parent means a natural mother or father, foster parent, or person in parental relation, or a legally appointed guardian or a surrogate parent for a child appointed in accordance with the procedures set forth in Sections 200.10 and 200.11 of this Part, and shall also include a child who has reached the age of eighteen.

(i) Resource room means a classroom area of adequate size to accommodate a special teacher, a small group of students as well as the specialized equipment necessary for instruction of handicapped children registered in special or regular classes who are in need of specialized supplementary instruction for varying periods during the day depending upon the severity of the handicapping condition and the educational needs of the child. Such a facility can be utilized as the foundation for a special educational program for handicapped children.

(j) Special class means a class consisting of handicapped children who have been grouped together because of similar educational needs for the purpose of being provided a program of special education under the direction of a certified special class teacher.

(k) Special class teacher means one who provides classroom instruction to handicapped children in special classes and who is certified in the area of special education for which such person is employed.

(l) Special teacher means one who provides supplementary instructional services to handicapped children who are enrolled in a regular class or special class and who is certified in the area of specialty in which the person is employed.

(m) Surrogate parent means a person appointed to act in place of parents or guardians when a child's parents or guardians are not known, are unavailable, or the child is a ward of the state.

Section 200.2 Committee on the Handicapped. (a) Each school district shall provide for each handicapped child a physical examination in accordance with the provisions of Section 904 of the Education Law, an individual psychological examination by an approved school psychologist, social history and such other suitable examinations and evaluation as may be necessary to ascertain the physical, mental and emotional factors which contribute to the handicapping condition.

(b) Each school district shall establish, appoint and maintain a committee, or contract with the board of cooperative educational services to secure the services of such committee, to include, but not limited to, a qualified school psychologist, a teacher or administrator of special education, a school physician, other responsible school authorities designated by the chief school officer and a parent of a child with a handicapping condition. The committee shall be responsible for determining whether a child possesses a handicapping condition, shall be responsible for recommending special educational services, and providing for, at least annually, a review and evaluation of the status of each handicapped pupil who is eligible to attend the schools of the district. The district shall file annually with the Commissioner of Education, the names and qualifications of the members of such committee. The duties of the committee shall include:

(1) A review and evaluation of all relevant information pertinent to each handicapped child, including the results of physical and psychological examination and other suitable physical, mental, emotional, and cultural-educational factors which may contribute to the handicapping conditions, all other school data which bear on the pupil's progress, and pertinent information presented by or on behalf of the parent, who shall be invited to present such information to the committee.

(2) Recommendations to the chief school officer or his designated subordinate as to appropriate educational programs and placement, and as to the advisability of continuation, modification, or termination of special class or program placements.

(3) Recommendations relative to the frequency and nature of periodic reevaluation of handicapped pupils by appropriate specialists, with the requirement that each child in a special program or special class be reexamined by an appropriate specialist at least once every three years.

(4) Recommendations for periodic evaluation of the adequacy of programs, services and facilities for handicapped children.

(5) Reporting at least annually, to the chief school officer, the status of handicapped children who are within the district or who are residents of the school district. Such reports shall be kept on file by the district for inspection by the Commissioner.

Section 200.10. Procedural due process in identification, evaluation and educational placement. (a) A committee on the handicapped which has reason to believe that a child possesses a handicapping condition to a degree sufficient to warrant provision of special educational services, shall give notice to the parent of its recommendation to the chief school officer that the child be classified as possessing a handicapping condition requiring provision of special educational services. Such notice shall:

(1) Describe the proposed classification and the reasons why such classification was deemed appropriate for the child.

(2) Specify the tests or reports upon which the proposed classification was based.

(3) State that the school files, records and reports pertaining to the child will be available for inspection and interpretation. Such records shall be available for review, and for duplication at reasonable cost.

(4) Describe in detail the right to obtain a hearing in accordance with the provisions of subdivision (c) of this section if there are objections to the proposed action.

(5) Include a statement of procedures for appealing the decision resulting from the formal hearing.

(6) Include a statement indicating that the parent shall be afforded an opportunity to obtain an independent educational evaluation of the child and which shall include the names, addresses and telephone numbers of appropriate public agencies where such services can be obtained at no cost to the parent.

(7) Except where the presence of a pupil in school poses a continuing danger to persons or property or threatens disruption of the academic process, assure that parent that the child will remain in his present educational placement until the chief school officer makes a decision in connection with any appeal brought pursuant to the provisions of subdivision (c) of this section.

(b) A committee which recommends to the chief school officer that there should be a change in the child's educational program or placement shall give notice to the parent of its recommendation.

Such notice shall:

(1) Indicate the availability of an informal hearing, at the request of the parent or the school, between the parents and school officials, to attempt resolution of conflicting points before a formal impartial hearing is required.

(2) Describe in detail the proposed change in placement and the reasons why such action is deemed appropriate for the child.

(3) Specify the test or reports upon which the proposed action is based.

(4) State that the school files, records and reports pertaining to the child will be available for inspection and interpretation. Such records shall be available for review, and for duplication at reasonable costs.

(5) Describe in detail the right to obtain a hearing in accordance with the provisions of subdivision (c) of this section if there are objections to the proposed action.

(6) Describe the procedure for appealing the decision resulting from the formal hearing.

(7) Indicate that the parent shall be afforded an opportunity to obtain an independent educational evaluation of the child and which shall include the names, addresses and telephone numbers of appropriate public agencies where such services can be obtained at no cost to the parent.

(8) Except where the presence of a pupil in school poses a continuing danger to persons or property or threatens disruption of the academic process, assure that parent that the child will remain in his present educational placement until the chief school officer makes a decision in connection with any appeal brought pursuant to the provisions of subdivision (c) of this section.

(c) Within ten days after receipt of notice of proposed recommendation classifying a child as "handicapped" or within ten days after notice of a proposed change in educational program or placement, a parent may request, in writing, an impartial formal hearing which will be conducted in accordance with the following rules:

(1) The chief school officer shall personally hear and determine the proceeding or may, in his discretion, designate an impartial hearing officer to conduct the hearing. The chief school officer or hearing officer shall be authorized to administer oaths and to issue subpoenas in connection with the administrative proceedings before him.

(2) A summary record will be made of the hearing.

(3) At all stages of the procedure, where required, interpreters of the deaf or interpreters fluent in the primary language of the child's home shall be provided at district expense.

(4) The chief school officer or his designee shall preside at the hearing and shall conduct the proceedings in a fair and impartial manner so that all parties shall be afforded an opportunity to present evidence and testimony.

(5) The parties to the proceedings may have representatives, including, but not limited to, legal counsel and other professional persons in attendance at the hearing.

(6) Unless a surrogate parent shall have previously been assigned, the impartial hearing officer shall, prior to the hearing, determine whether the interests of the child would best be protected by assignment of a surrogate parent.

(7) The hearing should be closed to the public unless the parent requests an open hearing.

(3) The parents, school authorities and their respective representatives shall have an opportunity to confront and question all witnesses at the hearing.

(9) If the child is over the age of eighteen, he or she shall have the right to attend the hearing.

(10) If the child has not attained the age of eighteen, the parents shall have the right to determine whether the child shall attend the hearing, except that upon a finding of the impartial hearing officer that attendance of the child would be harmful to his/her welfare, the child may be excluded from portions of or the entirety of the hearing.

(11) Where a chief school officer designates a hearing officer to conduct the hearing, such hearing officer shall make written findings of fact and a recommendation to the chief school officer within ten days as to the appropriate classification or educational placement. A copy of the proposed findings of fact and

recommendation shall be transmitted by certified mail to the parents, to school authorities and their respective representatives with an indication that the recommendation is not binding upon the chief school officer.

(12) The parents, school authorities and their respective representatives may submit to the chief school officer, objections to the proposed findings of fact and recommendations within ten days from receipt of the hearing officer's findings of fact and recommendation.

(13) The chief school officer, where he conducts the hearing personally, shall render a decision in writing within ten days. Where a hearing officer has been designated by the chief school officer to conduct the hearing, the chief school officer shall render a decision in writing within ten days following the period during which the parent or school authorities may submit objections to the proposed findings of fact and recommendations. Such decision shall be based solely upon the record of the proceedings below and shall set forth the reasons and the factual basis for the determination.

(14) A decision of the chief school officer shall include a statement of procedures to be used for appealing such decision to the Commissioner.

(d) State administrative review. (1) An appeal from the determination of a chief school officer may be initiated in writing by the parent or by school authorities within ten days after receipt of the determination sought to be reviewed. Such appeal shall be directed to the Commissioner of Education, who shall decide such appeal solely upon the record in the proceedings below. Either party may, however, submit statements in support or opposition to the determination sought to be reviewed. The Commissioner may delegate to the Assistant Commissioner for Education of Children With Handicapping Conditions the authority to decide such appeals. The decision of the chief school officer shall be affirmed if supported by substantial evidence.

(2) Except where the presence of a child in a school poses a continuing danger to persons or property or threatens disruption of the academic process, the child shall remain in his present educational placement pending review of the decision of the chief school officer by the Commissioner of Education or his designee.

(3) If either party to the appeal to the Commissioner of Education is not satisfied with his determination, such party may commence a proceeding pursuant to Article 78 of the Civil Practice Law and Rules to review such determination.

Section 200.11 Surrogate parents. (a) Register. Each school district shall compile a register of individuals willing to appear on behalf of a child under circumstances where the child's natural parents or guardian are unknown or unavailable or where the child is a ward of the State.

(b) Qualifications. Persons selected as surrogate parents shall not be officers, employees, or agents of the local school district or State Education Department involved in the education or care of children, and shall to the maximum extent possible:

(1) Have no other interest which could conflict with their primary allegiance to the child they would represent.

(2) Be committed to acquaint themselves personally and thoroughly with the child and the child's educational needs.

(3) To the maximum extent possible, be of the same racial, cultural and linguistic background as the child they seek to represent.

(4) Be generally familiar with the State and local educational system.

(c) Procedures for assigning surrogates. Assignment of a surrogate parent to a particular child shall be made in accordance with the following procedures:

(1) Any person whose work involves education or treatment of children who knows of a child who may need special education services, and who knows that the parents or guardians are not known or are unavailable, or the child is a ward of the State, may file a request for assignment of a surrogate parent to the child with the child's school district.

(2) The school district shall send notice of the possible need for a surrogate parent to the adult in charge of the child's place of residence and to the parents or guardians at their last known address.

(3) The school district shall determine whether the parents or guardians are unknown or unavailable, or whether the child is a ward of the State. This determination shall be completed within a reasonable time following the receipt of the original request for a surrogate parent. If the school district finds that there is a need for a surrogate parent such assignment shall be made by the chief school officer within ten days.

(4) Once assigned, the surrogate parent shall represent the child at least through the time of the first periodic review of the child's educational placement. In all instances, where appropriate, the child shall be represented by a surrogate parent throughout the entire review process.

Section 200.12 Educational Evaluations. Each school district shall prepare a register of public or private agencies and other professional resources within the county from which a parent or surrogate parent may obtain an independent evaluation of the child at no cost to the parent.

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

Joseph Lieberman

being duly sworn, says, that on the 29 day of APRIL 1976

at No. 199 Montague St in the Borough of BKLYN in The City of New York, he served a copy

of the annexed Appellees Brief upon Gene Neckane Esq.,

the attorney for the LEGAL-AID SOCIETY in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Sworn to before me, this 29

day of APRIL, 19 76

Joseph Lieberman

SHARON L. FEIGENBAUM
Commissioner of Deeds
City of New York No. 2 2762
Certificate Filed in New York County
Commission Expires March 1, 1977

Sharon L. Feigenbaum